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In the Supreme Court of the United States

OCTOBER TERM, 195~~8~~

LOVANDER LADNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals, as amended on April 4, 1956, is reported at 230 F. 2d 726. The opinion of the District Court appears at pp. 13-14 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1956. On May 10, 1956, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to June 28, 1956. The petition was filed on June 21, 1956, and was granted November 13, 1956. 352 U. S. 907. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether separate counts of an indictment charging assaults on the same day upon two different federal officers on account of the performance of his duties, stated separate offenses, so as to support consecutive sentences.

by
each

STATUTE INVOLVED

18 U. S. C. (1946 ed.) 254, presently 18 U. S. C. 111, provided:

Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in section 253 of this title while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than \$5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than \$10,000, or imprisoned not more than ten years, or both.

STATEMENT

In June, 1944, in the United States District Court for the Southern District of Mississippi, petitioner and another were convicted on a three count indictment charging conspiracy to assault federal officers on account of the performance of their duties and two substantive offenses of assault, each naming a separate federal officer (R. 1-5, 10). The second count alleged that petitioner and his co-defendant, by means of loaded shotguns, assaulted and wounded Reed, an agent of the Alcohol Tax Unit "on account of the

performance of his official duties", while Reed was then, to the defendants' knowledge, engaged in the performance of his official duties acting jointly with W. W. Frost, another agent, both of whom had various persons under arrest and were transporting them to jail. The third count was in the same language as the second except that Frost was named as the officer assaulted and wounded and Reed as his companion (R. 3-5). Petitioner was sentenced to ten years on each of the substantive counts, the sentences to run consecutively (R. 10-11).¹

In January, 1955, petitioner moved to correct the sentence on the ground that the two substantive counts charged only one offense (R. 11-12). In a supporting brief, he alleged that evidence at the trial "showed that the two officers were together on the front seat of an automobile" and he "fired a shotgun into the vehicle" (see R. 18). The District Court denied the motion without a hearing (R. 14-15). In his opinion, the district judge stated that, despite the absence of a transcript,² his personal recollection was that the evidence in the case showed that more than one shot had been fired. His holding was that an assault upon each officer was a separate crime (R. 13-14). See also *United States v. Cameron*, 84 F. Supp. 289 (S. D. Miss.), where the District Court

¹ A sentence of two years was imposed on the first count to run concurrently with the sentence imposed on the second count.

² The trial took place in 1944, prior to the enactment, in 1948, of 28 U. S. C. 753, which provides for the recording of all proceedings in criminal cases.

had made a similar ruling as to petitioner's co-defendant.

On appeal, the Court of Appeals affirmed the judgment of the District Court (R. 22). In its opinion (R. 17-22), the Court of Appeals stated that, if it were significant whether one or more shots were fired, petitioner should have had a hearing to determine the facts. It ruled that, in this case, no hearing was necessary since petitioner "was guilty of a separate assault upon each of the two officers who were wounded by his gun fire," and that this was so whether one or more shots were fired.

SUMMARY OF ARGUMENT

The courts below, for the purpose of decision, assumed that the evidence adduced at petitioner's trial showed that one shot injured two officers, each engaged in the performance of his official duties. They properly held that, even on this assumption, consecutive sentences could properly be imposed for assaults upon each officer.

An assault, not a wounding, is the crime for which petitioner was convicted. The statute provides for the punishment of one who assaults a federal officer "on account of the performance of his official duties." The unit protected (a federal officer), the basis of federal jurisdiction (performance of duties as an officer), and the intent of the defendant (assault on account of the performance of duty) are all necessarily personal and individual as to each officer involved. For this reason, both as a matter of statutory construction and of double jeopardy, the assault on

each officer "on account of the performance of his official duties" is a separate offense. The number of shots fired in assaulting each officer is therefore immaterial.

I

The words of the statute are in the singular. The legislative history shows that Congress wished to protect each federal officer, not only to promote the orderly functioning of the federal government but also to protect the individual officer as a "ward" of the government. Since the basis of federal jurisdiction is interference with a federal officer in the performance of his duty, the crime is in its nature individual as to each officer who is prevented from doing his duty. And most important, the elements of the offense are separate as to each officer. Assault is an offense against each person. And in addition, under this statute, the reason for the assault must be personal, *i. e.*, each officer must be assaulted "on account of the performance of his official duties." Thus, by every criterion by which legislative intent can be judged, an assault upon each officer is a separate offense.

II

Recognizing that under the decisions of this Court one act may constitute two crimes without violating the constitutional provision against double jeopardy, petitioner makes no claim that each assault could not constitutionally be separately punished. It is significant, however, that, where this question has arisen in terms of double jeopardy, even in the context of a new

trial after a prior acquittal or conviction, this Court and the overwhelming majority of the states (perhaps all of the states) hold that there is a separate offense as to each person injured, at least in the situation where there is intent to injure each victim. Since, here, the statute requires intent not only to assault each officer, but to do so for a reason which must be specific and personal as to each officer, multiple punishment for the two assaults would violate no constitutional rights.

III

Since the number of shots is, in our view, not significant to the issue of the validity of consecutive sentences for each assault, there is no occasion for a hearing in the District Court. Under the indictment in this case, the jury had to find intent, as to each officer, that the assault was "on account of the performance of his official duties".

Assuming that the number of shots would be material, there is a serious question as to whether the issue can be determined now by collateral attack. Petitioner's allegation that only one shot was fired is not admitted by the government. It is possible that there was conflicting evidence as to this fact at the trial. A judge at a hearing now could thus be called upon, not only to determine what the evidence was at the trial, but to resolve a conflict which could and should have been resolved by a trial jury. To permit such an issue to be raised on collateral attack would extend the remedy far beyond its present limits.

ARGUMENT

The courts below have decided this case as on a motion to dismiss for failure to state a cause of action. They have, for the purposes of decision, accepted as true the dubious version of events suggested by petitioner—that in an affray by two persons (petitioner and his co-defendant) with loaded shotguns, there was only one shot fired which wounded two officers riding in a moving vehicle. The courts have held that, even on this assumption, petitioner was properly convicted of two offenses since, under 18 U. S. C. 254, each assault upon each officer, on account of the performance of his official duties, must necessarily be a separate offense. We discuss the case primarily on that basis because it seems to us that, under this statute and this indictment, each charge with respect to the two officers had to be separate as to the elements of the offense and the proof, and that this is so regardless of the number of shots fired. Indeed, since assaults and not woundings are the crimes for which petitioner and his co-defendant were convicted, the firing of any shots is immaterial. An assault on each of the officers was committed when the loaded shotguns were aimed at both officers and before any shot was fired.

The government's position is basically this: under former 18 U. S. C. 254 (present 18 U. S. C. 111), the unit protected (a federal officer), the basis of federal jurisdiction (performance of duties as an officer), and the intent of the defendant (assault on account of the performance of duty) all are necessarily personal to each officer involved. For this reason, the statute

should be interpreted as imposing a separate penalty for assault upon each officer. Under all the relevant principles and decisions of this Court, and even under theories more restrictive of the prosecution followed in some states, which this Court has never adopted, separate offenses result from injuries to more than one person from one act if the interest protected, the harm done, and the intent of the defendant all are personal and individual as to each of the victims.

I

AS A MATTER OF STATUTORY CONSTRUCTION, ASSAULT UPON EACH FEDERAL OFFICER ON ACCOUNT OF THE PERFORMANCE OF HIS DUTY IS A SEPARATE OFFENSE

In conceding, as he does, that Congress could have imposed double punishment for the double impact of a single blow on two federal officers (Pet. Br. 22), petitioner disclaims any reliance upon the constitutional protection against double jeopardy as a basis for his contention that the two counts involved in this case state only one offense. While we undertake to discuss the double jeopardy question, *infra* pp. 19-24, it is well to note at the outset that this case is basically different from the two state cases preceding it in this Court (*Barktus v. Illinois*, No. 39, this Term, and *Hoag v. New Jersey*, No. 40, this Term), which raise issues of double jeopardy with overtones of *res judicata*. Even if the constitutional provision can be said to be involved here, it does not arise in the context of one jury finding guilt contrary to the finding of innocence by another jury. In contrast to the preceding state cases, there was here one trial by one jury which returned

a completely consistent verdict to the effect that the defendants assaulted with dangerous weapons each of two federal officers on account of the performance by each of his duty as a federal officer. The question is merely whether Congress has made that one offense or two.

A. THE PURPOSE OF THE STATUTE, THE BASIS OF JURISDICTION, AND THE NATURE OF THE OFFENSE ALL POINT TO EACH INDIVIDUAL OFFICER AS THE UNIT OF THE CRIME.

1. Petitioner was indicted under that portion of former 18 U. S. C. 254 which punished one who assaults a federal officer "on account of the performance of his official duties", the statute then providing for an increased penalty if "in the commission of any of the acts described in this section" a deadly weapon was used. Manifestly, the use of the dangerous weapon is not, as petitioner claims (Pet. Br. 10-21), the gravamen of the offense. It is not a separate offense at all. Like the provision for aggravated punishment for putting life in jeopardy under the bank robbery statute (see *Holiday v. Johnston*, 313 U. S. 342, and cases cited Pet. Br. 25), the portion of this statute relating to use of a dangerous weapon merely authorizes increased punishment. If this were less clear than it is from the words of the statute, the legislative history makes this explicit. The Act of May 18, 1934 (48 Stat. 780, 781), enacting former 18 U. S. C. 253 and 254, was entitled "An Act to Provide Punishment for Killing or Assaulting Federal Officers". The House Report (H. Rep. No. 1455, 73rd Cong., 2d Sess.) states of Section 2 (18 U. S. C. 254) that "[i]f a dangerous

weapon is used in the commission of any such offense the penalty is increased".

The elements of the offense are, therefore, not the use of a dangerous weapon but (1) assault upon a federal officer, (2) on account of the performance of his official duties. Each of these elements makes the individual officer the basic unit of the crime.

(a). Assault is a crime against a person. The definitions of assault given by Bouvier (in his law dictionary) are those commonly accepted:

An unlawful offer or attempt with force or violence to do a corporeal hurt to another.

Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril.

These elements make each individual assaulted a separate unit of crime. The threat of violence may be by one act addressed to several persons, but its purpose must be to put each individual in fear. And certainly the apprehension of peril aroused by the act is personal and separate as to each individual threatened.

Petitioner agrees, and indeed emphasizes the fact that an assault, and not a wounding, is the offense named in the relevant portion of the statute (Pet. Br. 11-13, 16-17, 20). Thus, in tracing the legislative history of Section 254, petitioner notes (Pet. Br. 16-17) that, "In particular, Congress refrained from taking cognizance of the effects of the acts proscribed in the statute, including the wounding of Federal officers." Presumably, petitioner concedes that if the statute read "or shall assault [or wound] him on ac-

count of the performance of his official duties", with the bracketed words inserted, his entire argument would fail and two crimes would be committed where a single discharge of a weapon wounds two officers. But surely Congress has as much right to protect federal officers from assaults as from batteries—as it has done in this statute—and it is inaccurate to state that Section 254 is "silent concerning the consequences of the forbidden act" (Pet. Br. 13). Although there need not be a physical impact—and, indeed an assault is committed even though the gun is never discharged—there must be an overt act by the defendant in such circumstances as to "cause a well-founded apprehension of immediate peril" to a person.

Petitioner nowhere suggests why an assault is any less personal, in the context of this statute, than the infliction of a wound. An assault, like a battery, is an intentional wrong directed against the person. And, since a single act may wound as many as it may assault, or vice versa, there is no intrinsic difference between the two in terms of possible multiplicity of crimes.³ Here, petitioner's assault constituted two separate crimes even before the shotgun pellets wounded the two federal officers.⁴

³ To commit an assault there must be at least an apparent ability to commit the battery attempted. *Miller on Criminal Law* (1934), p. 307. One could not therefore be guilty of assaulting a multitude of persons unless he had the apparent ability to commit a battery on the multitude.

⁴ If, in a hypothetical case, a defendant, holding two federal officers hostage and intending to kill both, forced them to stand in such a position that a single bullet which he fired passed

(b). Even more separate and individual is the second element of the offense, that the assault must be "on account of the performance of his official duties". Under this section an assault upon a federal officer, even with knowledge that he is a federal officer, would not be sufficient; the assault must be committed because the officer is performing his official duties. Hence it is possible for a person to shoot two persons with one shot, or two shots fired consecutively, and still be guilty of an offense under this statute as to one person but not as to the other. (That result could obtain, for example, if the defendant shot at one officer because of a personal grudge knowing that the officer was not acting in his official capacity in accompanying an officer who was so acting). We need not speculate on the factual possibilities. The point is that as to any conviction under this statute, as to each officer, a jury would have to find that the particular officer was assaulted because he was then and there performing his official duty. The purpose as to each officer must be separate and individual, not only in relation to the assault, but in relation to the reason for the assault.

2. In addition to the fact that each element of the offense is separate and individual, the basis for federal jurisdiction in this statute is separate and individual. The basis of federal jurisdiction is inter-

through both bodies and killed both officers, few would contend that two murders had not been committed. See *infra* p. 18. Clearly, the act of raising and aiming the weapon constituted an assault against each of the officers and did, no less than the discharge of the gun, constitute two separate crimes.

ence with a federal officer in the performance of his duties. To the extent that each officer is prevented from doing his duty, there is an obstruction of federal power and an impairment of federal efficiency.

This case is thus materially different from *Bell v. United States*, 349 U. S. 81, on which petitioner relies, in which this Court held that, as a matter of statutory construction, a single transportation of two women in interstate commerce for immoral purposes constituted only one offense. There, although there had to be a purpose as to each woman, the basis of federal jurisdiction (and an essential element of the crime) was the transportation, which was single. Here, not only is the purpose and effect as to each officer assaulted separate, but the basis of federal jurisdiction is also separate since the basis for invoking federal power is the presence of each individual federal officer.

3. Moreover, both the words of the statute and the legislative history show that Congress intended to protect each officer individually. The statute consistently uses words of singularity, *e. g.*, "Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with *any* person designated in section 1 hereof while engaged in the performance of *his* official duties, or shall assault *him* on account of the performance of *his* official duties" (emphasis added).

The legislative history makes even clearer the purpose to protect each and every federal officer in the performance of his official duties. S. Rep. No. 535, 73d Cong., 2d Sess., states, "The purpose and need

of this legislation are set out in the following letter from the Attorney General to the chairman of this committee." In his letter the Attorney General said:

The need for general legislation * * * for the protection of Federal officers and employees * * * becomes increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States * * * for the protection of its investigative and law-enforcement personnel * * *. This Department has found need for * * * legislation for the adequate protection of the special agents of its division of investigation, several of whom have been assaulted in the course of a year, while in the performance of their official duties.

In these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government. * * *

See also H. Rep. 1455, 73d Cong., 2d Sess., and 78 Cong. Rec. 8126-8127, where the House debate reflected the purpose of bringing certain federal officers under federal protection. The legislation was aimed at protecting federal officers, not only to promote the orderly functioning of the federal government (whose efficiency would diminish in proportion to the number of individual officers affected), but also to protect the individual officers, as "wards" of the federal government, from personal harm. Both of these legislative objectives make the individual officers a separate unit of protection.

B. SINCE THE INTEREST PROTECTED, THE NATURE OF THE HARM, AND THE INTENT OF THE DEFENDANT ALL RELATE TO THE INDIVIDUAL OFFICER AS A SEPARATE UNIT, THE COURTS BELOW PROPERLY HELD THAT AN ASSAULT UPON EACH OFFICER ON ACCOUNT OF THE PERFORMANCE OF HIS DUTIES IS A SEPARATE CRIME.

In *Bell v. United States*, 349 U. S. 81, this Court warned that “* * * it will not promote guiding analysis to indulge in what might be called the color-matching of prior decisions concerned with ‘the unit of prosecution’ in order to determine how near to, or how far from, the problem under this statute the answers are that have been given under other statutes”. See also *Prince v. United States*, 352 U. S. 322. We therefore do not elaborate the fairly obvious argument that if, as this Court held in *Ebeling v. Morgan*, 237 U. S. 625, the cutting of six mail bags at one time constitutes six offenses on the theory that Congress intended to protect each mail bag, assaulting two officers at one time constitutes two offenses since Congress clearly intended to protect each officer. What we do emphasize is that, as developed in the preceding pages, as to this particular crime, every element by which statutory intent can be judged, and indeed, every reason of policy—the protection of the person, the protection of federal efficiency, the basis of federal jurisdiction, the nature of the offense, and the individualized intent of the defendant—all support the conclusion that, in this statute, Congress intended to and did make each individual officer the unit of the crime. Assault, therefore, upon each officer on account of the performance of his official duties is a separate offense, whether the

assault was perpetrated by one act or a series of acts. Without indulging in "color matching", we think it is fair to point out that petitioner has not cited, and we think cannot cite, any case which has held that injury to two persons constitutes only one offense where the basic crime is injury to the person and there must be a separate intent to assault each individual on account of his performance of duty.

The case which comes closest to supporting petitioner is *Bell v. United States*, 349 U. S. 81, where this Court held that one transportation of two women for the purposes of the Mann Act was one offense. But, as we have already pointed out (*supra*, p. 13), the *Bell* case is distinguishable in that there the basis of federal jurisdiction was the transportation, which was single. In *United States v. Universal C. I. T. Corp.*, 344 U. S. 218, where this Court held that the offense punishable under the Fair Labor Standard Act was a course of conduct, there was specific legislative history in support of that conclusion. Moreover, the Court in that decision treated as one offense "all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse' ". 344 U. S. at p. 224. Here, as we have pointed out, the statute in punishing an assault "on account of the performance of his official duties" necessarily requires that there be two separate elements of intent—the purpose to create fear and the purpose to prevent official action—separately proved as to each individual officer. There can be no single impulse even if there is a single discharge of a gun.

As to the decisions of lower courts, cited by petitioner (Pet. Br. 25),⁵ which have held under the bank robbery statute that there can be only one punishment for the aggravation of the offense by putting life in jeopardy no matter how many persons are threatened, they are (regardless of their validity) of no aid in the solution of the present problem. In those cases the basic offense is taking the property of the bank; the unit protected is the bank, and the jeopardizing of life is not a separate crime but is merely a basis for increasing the penalty. *Holiday v. Johnston*, 313 U. S. 342. Here, the basic crime is the offense against the person, and the unit protected is the person. Each person is therefore properly treated as the unit of the crime.

We discuss, *infra* pp. 19-24, the problem of multiple injuries arising from one act as an issue of double jeopardy. It is in that context that most of the state decisions have arisen. But, on the issue of statutory construction, it is significant that, as we develop below, injury to the person has been considered such a serious matter that, even in the context of double jeopardy in relation to second trials, the majority of states hold that the injury of each individual is a separate crime even though there was only one act and one intent. It is even more significant that we have found no state which clearly holds that one discharge of a gun constitutes one offense of assault or murder where there is an attack against two persons,

⁵ *Lockhart v. United States*, 136 F. 2d 122 (C. A. 6); *Dimenza v. Johnston*, 130 F. 2d 465 (C. A. 9).

with intent to injure each.* As shown *infra*, the overwhelming majority of the states hold that there is a separate offense as to each person injured, at least in the situation where there is intent to injure each victim. As was said in *State v. Robinson*, 12 Wash. 491, 495, 41 Pac. 884:

The taking of a human life with certain intent constitutes murder, and neither law nor public policy will justify a holding that each life is of less value when taken with another than it would be if taken alone. If a person without justification intends to kill A and does so, he will be guilty of a crime; if he intends to kill B, he will be guilty of another and a different crime; and the fact that he entertains the intent to kill both and carries such intent into effect at the same time and place, should not be held to make of that which would otherwise be a foundation for two distinct prosecutions a foundation for only one.

*The decision generally cited for this proposition is *State v. Damon*, 2 Tyler (Vt.) 387, 390, where the court said: "The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows he has been legally convicted by a Court of competent jurisdiction. He cannot therefore be again held to answer in this Court for the same offence."

On the theory that both indictments were for the *same breach of peace* and not for wounding two persons by the same wrongful act, this case may be harmonized with what we think is the rule in all the other states. See *People v. Majors*, 65 Cal. 138, 3 P. 597.

II

THE CONSTITUTIONAL PROVISION AGAINST DOUBLE JEOPARDY DOES NOT BAR THE PUNISHMENT OF SEPARATE INJURIES TO SEPARATE INDIVIDUALS AS SEPARATE OFFENSES, PARTICULARLY WHERE THERE MUST BE A SEPARATE INTENT AS TO EACH INDIVIDUAL

The disclaimer by petitioner's attorney of any reliance on principles of double jeopardy finds ample support in the decisions of this Court. The Court has held, in different contexts, that one act may result in multiple crimes. See, e. g., *Pereira v. United States*, 347 U. S. 1, 9. It has held that an initial step like possession does not necessarily merge in the completed act of sale of which the initial step is a part (*Albrecht v. United States*, 273 U. S. 1); that one act of sale may violate different parts of one statute (*Blockburger v. United States*, 284 U. S. 299); that one insult may be two different crimes (*Gavieres v. United States*, 220 U. S. 338). Specifically as to two assaults at the same time (although not apparently by one act) this Court held in *Flemister v. United States*, 207 U. S. 372, 375, that there was nothing in the Philippine bill of rights¹ "that forbids assaults on two individuals being treated as two offenses, even if they occur very near each other in one continuing attempt to defy the law." The rule laid down by this Court is that, if the facts necessary to establish the first indictment (not the

¹In *Trono v. United States*, 199 U. S. 521, the Court had treated the guaranty against double jeopardy in the Philippine bill of rights as the same as that guaranteed by the Fifth Amendment.

actual facts proved but those necessary to make out an offense) would not prove the second offense, the offenses are distinct. *Pinkerton v. United States*, 328 U. S. 640, 643-644; *Blockburger v. United States*, 284 U. S. 299, 304; *Gavieres v. United States*, 220 U. S. 338, 342; *Carter v. McClaughry*, 183 U. S. 365. In this case, proof that petitioner was shooting at one officer "on account of the performance of his official duty" would not necessarily prove either that petitioner intended to shoot the other officer, or that he did so because the other officer was performing his official duty. There was thus no double jeopardy.

For the purposes of double jeopardy this Court has not differentiated between multiple sentences and retrial after a prior acquittal or conviction on one offense. It has dealt with the problem of retrial in terms of *res judicata*, rather than double jeopardy. See *Sealfon v. United States*, 332 U. S. 575; *Adams v. United States*, 281 U. S. 202. Much of the confusion and conflict which has been noted in state cases in this field arises, we think, from different views as to the extent that *res judicata* principles should be incorporated in the concept of double jeopardy. As noted, in contrast to the *Hoag* and *Barktus* cases (which the Court is also hearing), no such problem is presented here. It is significant, however, both in statutory and constitutional terms, that, even in the context of the weight to be given to a former conviction or acquittal, there is almost complete agreement that injuries to two persons are separate crimes if there must be a separate intent as to each.

In situations where there has been a series of acts at the same time and place in the same affray, resulting in either similar or dissimilar injuries to several persons, there is almost complete unanimity of result in finding, as this Court held in *Flemister v. United States*, 207 U. S. 372, that the injury to each person may be a distinct offense.* The decisions reaching a contrary result do so on the basis of the absence of intent to injure more than one person. *Hurst v. State*, 24 Ala. App. 47; *Spannells v. State*, 83 Tex. Cr. Rep. 418; and *State v. Houchins*, 102 W. Va. 169. All three of these cases turn upon a question of intent; in each the defendant unintentionally killed an innocent bystander along with an alleged assailant as he, in self-defense, and with a single volition, shot at the assailant. In holding that a former acquittal for the death of one of the victims was a bar to prosecution for the death of the other, the decisions

* *Kilpatrick v. State*, 257 Ala. 316; *Blevins v. State*, 20 Ala. App. 229; *Gunter v. State*, 111 Ala. 23; *Bell v. State*, 120 Ark. 530; *People v. Alibez*, 49 Cal. 452; *In re Allison*, 13 Colo. 525; *People v. Stephens*, 297 Ill. 91; *State v. Melia*, 231 Iowa 332; *State v. Taylor*, 138 Kan. 407; *Wallace v. Commonwealth*, 207 Ky. 122; *Canada v. Commonwealth*, 242 Ky. 71; *Ridner v. Commonwealth*, 242 Ky. 557; *Combs v. Commonwealth*, 259 Ky. 703; *State v. Roberts*, 170 La. 727; *Johns v. State*, 130 Miss. 803; *Teat v. State*, 53 Miss. 439; *State v. Nash*, 86 N. C. 650; *State v. Billotto*, 104 Ohio St. 13; *Orcutt v. State*, 52 Okla. Cr. 217; *Commonwealth v. Melissari*, 298 Pa. 63; *Commonwealth v. Valotta*, 279 Pa. 84; *State v. Corbitt*, 117 S. C. 356; *Duke v. State*, 197 Tenn. 346; *Alsop v. State*, 120 Tex. Crim. Rep. 310; *Berwick v. State*, 120 Tex. Crim. Rep. 322; *Augustine v. State*, 41 Tex. Cr. Rep. 59; *Skelton v. State*, 110 Tex. Crim. Rep. 621; *State v. Robinson*, 12 Wash. 491; *State v. Evans*, 33 W. Va. 417. See Note, 40 Yale L. J. 462, 465.

distinguish the situation which involves two violations. The *Hurst* decision specifically noted that, if there be formed design as to each victim, two offenses result.

Where there is only one act but distinct intents as to each person injured the state cases hold that there are two offenses. *E. g., Berry v. State*, 195 Miss. 899, where the court said:

If, for instance, knowing that a person is alone in a house and so ill as to be unable to move, an accused sets fire to the house in order thereby to burn to death the disabled person, and such is the result, there would be but one act, the setting of the fire, but there would be two offenses, arson and murder, one against the person and the other against the property. If, then, there were two disabled persons in the house, like reason would produce the result that three offenses were committed. To pursue the illustration further: Had one of the inmates succeeded, although severely burned, in crawling from the fire, and thereby survived, it would hardly be contended that the conviction or acquittal of the accused for the attempt upon the life of the survivor would bar a prosecution for the murder of the other. Thus, in point of law, the offenses are distinct, although the product of a single act.

The only holding *contra* that we have found is *State v. Damon*, 2 Tyler (Vt.) 387, which, as noted, *supra*, p. 18, fn. 6, may be distinguished on the ground that the offense was breach of peace rather than injury to the person. Indeed, injury to the person has been regarded as so personal and serious a crime that

(while the evidence may in fact show intent as to each individual) the majority of the state opinions indicate that each injury would constitute a separate offense, even where there was only one act and intent to injure only one individual. *People v. Brannon*, 70 Cal. App. 225, 233; *People v. Majors*, 65 Cal. 138; *People v. Vaughn*, 215 Ill. App. 452; *Commonwealth v. Browning*, 146 Ky. 770; *Keeton v. Commonwealth*, 92 Ky. 522; *State v. Nash*, 86 N. C. 650; *State v. Corbitt*, 117 S. C. 356; *Vaughan v. Commonwealth*, 2 Va. Cas. 273; *Commonwealth v. Allen*, 18 Va. Law Reg. 410; *Winn v. State*, 82 Wis. 571. These authorities are relied upon, and buttressed by, the many recent decisions which have sustained separate manslaughter prosecutions for each wrongful death resulting from a single reckless act in the operation of an automobile. Significantly, where a contrary view is taken it is on the basis that there is only one intent. *State v. Wheelock*, 216 Iowa 1428; *Smith v. State*, 159 Tenn. 674. See also *State v. Cosgrove*, 103 N. J. 412.

In short, there is almost universal agreement among the states that, at least where two persons are injured pursuant to a design on the part of the defendant to injure each, there are two offenses. This, we think, accords with the general view of moral responsibility. It would be incongruous to hold that, if a person succeeded in killing three persons with one

* *McHugh v. State*, 160 Fla. 823; *People v. Allen*, 368 Ill. 368; 308 U. S. 511; *State v. Carte*, 157 Kans. 673; *Fleming v. Commonwealth*, 284 Ky. 209; *Commonwealth v. Maguire*, 313 Mass. 669; *State v. Fredlund*, 200 Minn. 44; *Burton v. State*, 79 So. 2d 242 (Miss.); *Jeppesen v. State*, 154 Nebr. 765; *State v. Martin*, 154 Ohio St. 539; *Fay v. State*, 62 Okla. Cr. 350; *Lawrence v. Commonwealth*, 181 Va. 582.

shot, he would be less guilty of three murders than if he fired three shots. Whatever may be the situation when two shots are fired against one person, or when one shot fired with intention to injure one person happens inadvertently to hit several persons, it seems to us clear, by every test used in the American courts, that when two persons are injured pursuant to an intent to injure each, there are two offenses, whether the intent is carried out by one discharge, several discharges from one gun, or several independent shots. And, as we have said, *supra*, pp. 10-11, no logical basis exists for distinguishing, for these purposes, assault cases, such as the instant case, from those cases where the actual wounding constitutes the gist of the crime. In both instances all the elements necessary to create separate crimes are present.

III

THERE IS NO OCCASION FOR A HEARING BEFORE THE DISTRICT COURT

If we are correct in our view that the offense against each officer is separate because there had to be a separate intent as to each officer, there is no occasion for a hearing in the District Court. Each of the substantive counts of the indictment alleged, as to each officer, that the defendant assaulted him "on account of the performance of his official duties." Thus, the jury, by its verdict, had to find that the assault was for the statutory reason as to each officer personally. Any attempt to argue that the facts are otherwise would be an attempt to retry issues which necessarily had to be before the trial jury. That can-

not be done on collateral attack. *Sunal v. Large*, 332 U. S. 174; *Harlan v. McGourin*, 218 U. S. 442; *Arthur v. United States*, 230 F. 2d 666, 668 (C. A. 5).

Assuming, however, that it would be necessary to determine whether one shot had been fired in order to know whether consecutive sentences should properly have been imposed, there would be presented an issue (which is hardly disposed of by characterizing it as frivolous (Pet. Br. 2)) as to the extent to which issues of fact relating to the evidence developed at a trial can be a basis of collateral attack on a judgment. This case is not like the situation in *Prince v. United States*, 352 U. S. 322, and *Bell v. United States*, 349 U. S. 81, where the facts alleged to show the existence of one offense, pleaded in different counts, were not disputed. Here one cannot tell from the face of the indictment whether one shot was fired or more than one, and there is no concession that the implied claim of one shot accords with the evidence at the trial. Indeed, the recollection of the judge and such evidence as is available, in the absence of a transcript, is to the contrary. A judge at a hearing in this proceeding would, therefore, be required first to determine what evidence was adduced at a trial many years before. And assuming that the evidence at the trial showed a conflict on this issue, he would have to resolve a conflict which could and should have been resolved by the jury sitting at the trial. This would extend the scope of collateral attack far beyond its present limits. It is not the function of a motion under 28 U. S. C. 2255 to pro-

vide a belated trial for conflicting issues of fact which should have been raised at the trial.

A motion under Section 2255 is not available merely because the claim is "that the sentence was in excess of the maximum authorized by law" any more than the remedy is automatically available because the claim is "that the sentence was imposed in violation of the Constitution or laws of the United States". Even a claim of denial of a constitutional right, e. g., that evidence was unlawfully obtained, does not furnish a basis of collateral attack when the issue is one which is essentially part of the trial proceeding, and could have been determined in that proceeding.

Adams v. United States ex rel. McCann, 317 U. S. 269, 274; *Davis v. United States*, 214 F. 2d 594, 596 (C. A. 7); *United States v. Walker*, 197 F. 2d 287, 288 (C. A. 2). The remedy under 28 U. S. C. 2255 was designed as a substitute for the writ of habeas corpus (see *United States v. Hayman*, 342 U. S. 205). It was not intended to enlarge collateral attack beyond that available on habeas corpus. *Taylor v. United States*, 229 F. 2d 826 (C. A. 8), certiorari denied, 351 U. S. 986; *Burns v. United States*, 229 F. 2d 87 (C. A. 8), certiorari denied, 351 U. S. 910; *Kreuter v. United States*, 201 F. 2d 33, 35 (C. A. 10). Originally, the writ of habeas corpus could be used to attack judgments of conviction only on the ground that the court was without jurisdiction. *Bowen v. Johnston*, 306 U. S. 19, 23-24. While the concept of "jurisdiction" has been enlarged so that the writ reaches many aspects which are not strictly speaking jurisdictional, those matters outside the record which have been held

to be grounds for collateral attack—*e. g.*, denial of counsel, knowing use of perjured testimony¹⁰—are all of a nature which undermine the fairness of the trial. In that sense the recognized grounds for collateral attack are still jurisdictional. As we have noted, the mere fact that error has been committed, even with relation to a claimed constitutional right, does not furnish, in itself, a ground for habeas corpus. This Court held in *Sunal v. Large*, 332 U. S. 174, that, where a judge erroneously prevented a defendant from offering at the trial a defense subsequently held available to one in his position, the conviction could not be attacked on habeas corpus since the issue was one which should have been raised on appeal. Similar in rationale—that the court on collateral attack cannot redetermine issues which should properly have been resolved at the trial—are the cases holding that, where an indictment on its face purports to charge a federal offense, it cannot be challenged, after conviction, unless it appears from the face that no offense could possibly have been committed. *Goto v. Lane*, 265 U. S. 393; *Johnson v. United States*, 239 F. 2d 636 (C. A. 6); *Alm v. United States*, 238 F. 2d 604 (C. A. 8); *Smith v. United States*, 205 F. 2d 768 (C. A. 10); *Klein v. United States*, 204 F. 2d 513 (C. A. 7); *Taylor v. United States*, 177 F. 2d 194 (C. A. 4). In short, as to federal convictions, where the trial itself is in accord with constitutional requirements, errors at the trial, even serious ones, have

¹⁰ See *United States v. Hayman*, 342 U. S. 205, 212, fn. 12, where various grounds for habeas corpus are summarized.

normally been held not to be a basis for collateral attack.

In this case, the issue as to whether there had to be one shot or two cannot be said (like the necessity of proving intent as to each officer) to have been an issue necessarily encompassed by the verdict, since the allegations of the indictment do not make that an issue. To that extent the case does not come within such rulings as *Harlan v. McGourin*, 218 U. S. 442, that the sufficiency of the evidence to support the verdict cannot be questioned on collateral attack. On the other hand, it is clear that the factual issue, if significant, could and should have been raised at the trial. If there was any conflict with respect thereto, it should have been submitted to and determined by the jury at the trial. This record shows that there is, at the very least, a dispute as to what was proved at the trial. It is possible, and indeed probable, that there was conflicting evidence at the trial as to the number of shots. Under these circumstances, the case seems to us to fall within the holding of *Sunal v. Large*, 332 U. S. 174, that conviction after a fair trial cannot be assailed because an available defense was not presented.

If the number of shots is the controlling factor, then the issue as to the extent to which, on collateral attack, a judge may determine either what was proved at the trial or resolve issues of conflicting proof at the trial is one which, we submit, should be decided by this Court at this stage. However, we do not think that the issue need be determined in this case since, for all the reasons hitherto discussed in Points I and II, we

think that the two substantive counts of this indictment allege two offenses, whether there was one discharge of a gun or more than one.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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